Editor's note: Appealed -- reversed and remanded, Civ. No. C-74-331(D.Utah April 26, 1976)

WILLIAM ALLEN

IBLA 73-294 Decided August 22, 1974

Appeal from a decision of Administrative Law Judge Dent D. Dalby affirming a denial of grazing privileges in the Vernal District, Utah.

Affirmed in part, set aside in part and remanded.

Grazing Permits and Licenses: Generally

> It is proper to issue nonrenewable licenses to Class 1 permittees for the use of one allotment in order to rest the permittee's normal allotment, which has been subject to overgrazing; such a shift, however, must be on a one-to-one basis and the District Manager is without authority to offer "bonus" AUM's as an inducement to the permittee.

APPEARANCES: H. James Clegg, Esq., of Worsley, Snow & Christensen, Salt Lake City, Utah, for appellant; Reid W. Nielson, Esq., Assistant Regional Solicitor, Department of the Interior, Salt Lake City, Utah, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

William Allen appeals from the decision of Administrative Law Judge Dent D. Dalby, dated February 7, 1973, affirming the denial of grazing privileges by the District Manager, Vernal District. The basic facts are not in dispute.

Prior to 1964, appellant had established base property qualifications entitling him to 850 AUM's within the Vernal District. Under the apportionment of the range then in effect, appellant was allowed the exclusive use of the Allen and Watson Allotments, and had joint use with a number of other licensees and permittees in the Willow Creek Allotment. The base lands offered for these grazing privileges consisted of E 1/2 SE 1/4 sec. 8, NW 1/4 NE 1/4, N 1/2 NW 1/4 sec. 7, SE 1/4 NE 1/4 sec. 18, T. 2 N., R. 24 E., S.L.M.; lots 10 and 11 sec. 2, lot 10, SE 1/4 SE 1/4 sec. 3,

N 1/2 NE 1/4, SE 1/4 NE 1/4, SE 1/4 sec. 10, lots 1, 2, 4, 7 and 8, NW 1/4 NW 1/4, SE 1/4 NW 1/4 sec. 11, T. 1 N., R. 25 E., S.L.M.; NW 1/4 SE 1/4 sec. 21, T. 2 N., R. 25 E., S.L.M., Utah. Additionally appellant had a homestead in Colorado, consisting of S 1/2, S 1/2 N 1/2, NW 1/4 NW 1/4 sec. 24, and NW 1/4 NW 1/4, NE 1/4 NE 1/4 sec. 25, T. 12 N., R. 104 W., 6th P.M., which also served as base lands for these grazing privileges.

Beginning in 1961-62 attempts were made by various state and federal agencies to acquire appellant's fee lands in order to mitigate adverse effects on wildlife that would be occasioned by the filling of the Flaming Gorge Reservoir. Appellant testified at the hearing that he had not been disposed to sell, but that under threat of condemnation proceedings he had reluctantly agreed. As one of the conditions of sale, appellant first transferred the 207 AUM's of federal range privileges from his Colorado homestead to his base lands in Utah. The sale of these lands was consummated on August 28, 1964. On that date appellant also tendered to the District Manager a relinquishment of all grazing privileges attached to his base property as aforementioned. This relinquishment was accepted on October 22, 1964. Allen retained fee title to lot 3, section 23, T. 2 N., R. 24 E., S.L.M.

Appellant contends, and the Government does not dispute, that he was informed by Jay L. Cordary, who was the authorized acquiring officer of the Bureau of Sport Fisheries and Wildlife, that should any subsequent grazing be permitted in the area of his permit appellant would have a preference right thereto. In the spring of 1965, the Bureau of Land Management issued one Reed Taylor a permit to graze cattle within the Allen Allotment. Appellant at that time protested to the District Manager on the grounds that he had a preferential right to a permit. The District Manager rejected his protest, whereupon appellant contacted Cordary. Subsequent thereto the permit to Taylor was canceled. 1/ No grazing occurred within the allotments in 1965 or 1966. Starting in 1967, however, the BLM permitted a number of individuals the grazing of cattle within the allotments. Appellant again protested but at that time he was advised that the representations made by Cordary were without any binding effect. In 1971 appellant made formal application for grazing privileges in his former allotments. On December 15, 1971, his application was rejected. Appeals to the Advisory Board were similarly rejected.

The statement attributed to Cordary is paralleled by a provision of the Manual of the Bureau of Sport Fisheries and Wildlife relating

1/ This action presumably occurred as a result of Cordary's intervention.

to the allowance of grazing within wildlife refuges. The relevant section provides:

> Priority is given to persons who owned land within the refuge at the time the land was acquired by the Federal Government. This priority will provide improved community relations and assure benefits from a stable permittee system. It applies so long as the former landowner continues to reside and operate land in the vicinity of the refuge and the use privilege can be made available by the Bureau. During any period when the Bureau cannot make such privilege available, the priority is suspended until there can be resumption of the use. The priority does not necessarily apply to the actual lands conveyed to the Government by the former owner, nor does it apply to descendants of such former owners. However, it does apply to a surviving spouse who also signed the conveyance instrument.
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> BSF Manual 3413c(1).

It is clear that the quoted section of the BSF Manual is premised on the assumption that the Bureau of Sport Fisheries and Wildlife is the agency administering the acquired lands. No land in the allotments, however, is under the jurisdiction of the Bureau of Sport Fisheries and Wildlife. The lands acquired from the appellant were conveyed to the State of Utah, Utah State Department of Fish and Game, by deed dated July 14, 1965. The other lands in the allotments, with the exception of the state school sections, have remained under the administrative jurisdiction of the Bureau of Land Management. Thus, the quoted provisions of the BSF Manual are not germane to the issues of this case, with one possible exception that we will examine infra.

Appellant contends that, notwithstanding Departmental regulations controlling the award of grazing privileges, the Bureau of Land Management is required to honor the representations of Cordary as to the preference rights of the appellant to any grazing in the allotments that might be authorized. This result, appellant argues, flows from the fact that Cordary was actually an agent for the Bureau of Land Management in the acquisition of his lands and that therefore under general agency rules, the BLM, as principal, is bound by Cordary's promises.

The Judge, in his decision, rejected this contention, noting:

> An applicant can acquire grazing rights on public land administered by the Bureau of Land Management within grazing districts only under the Taylor Grazing Act and the regulations issued pursuant to that statute, 43 CFR

> 4110. Erroneous advice of Federal governmental employees cannot confer any right not authorized by law. Alaska District Council of the Assemblies of God, Inc., 8 IBLA 153 (1972); Southwest Salt Company, 2 IBLA 81, 78 I.D. 82 (1971); Fred and Mildred M. Bohen, 63 I.D. 65 (1965).
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> (Dec. at 4.)

While we agree with the general statement of the law as set out by the Judge, we are troubled by certain factors peculiar to this case. First, Cordary was, in actual fact, the purchasing agent of the Department in the transaction involved herein. As the purchasing agent, it was within the scope of Cordary's authority to advise Allen that the fee lands being purchased by the Government were being retired from active grazing use and that if they were part of a federal wildlife refuge and if grazing were to be permitted thereon at a later date, he (Allen) would enjoy a preference right to participate in such grazing. 2/ We believe that as regards the fee land purchased from Allen, such land is impressed with a preference right to Allen so long as administrative jurisdiction over the land remains in the Department, regardless of what specific Departmental bureau is exercising such jurisdiction. However, the record shows that title to the fee land purchased from Allen by Cordary on behalf of the Bureau of Sports Fisheries and Wildlife was transferred by a deed executed by the Assistant Secretary of the Interior for Fish and Wildlife and Parks on July 14, 1965, to the State of Utah, Department of Fish and Game. This instrument of transfer is silent as to any agreement with Allen and we believe that it effectively terminated any oral understanding that might have existed earlier between Allen and Cordary.

But a differentiation must be made between the fee land which was purchased from Allen and his grazing privileges on lands which are presently, and were at the time of the sale, administered by the BLM. While Cordary was authorized to purchase Allen's fee lands and obtain a relinquishment of his federal AUM's, he had no power to effect the subsequent administration of those lands in the Watson and Allen allotments which were under BLM administration. Thus, no preference could be given for the BLM lands on the basis of representations made by Cordary.

As a second ground of relief appellant argues that the District Manager is required, after a determination that excess forage exists, to classify such excess forage as either Class 1 or Class 2. 3/ The

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2/ BSF Manual, sec. 3413c(1).

3/ Base properties dependent by use are Class 1; base properties dependent by location are Class 2. 43 CFR 4110.0-5. The fee lands retained by Allen entitle him to consideration, along with others, for Class 2 grazing privileges of any area available in the Vernal District.

Bureau of Land Management contends: (1) there is no excess forage to classify; and (2) the BLM Manual authorizes the action they have taken.

The Government's argument on the first point proceeds along the following lines: the only reason grazing privileges have been awarded in the Allen and Watson allotments is to control grass growth in order to effectuate the Multiple Use Management Plan. There is, therefore, no surplus unadjudicated forage available to be designated either Class 1 or Class 2.

There is no doubt that there is forage present in the Allen and Watson Allotments sufficient in amount to permit the grazing of up to 380 head of cattle from April 10 to June 15 (Tr. 82). The crucial issue is whether such forage is "surplus forage." It is difficult to deal with this question until there is a determination of what "surplus forage" means in this context. The expression as normally used refers to an amount of forage in excess of that which would satisfy the rights of Class 1 applicants so as to be available for further adjudication between Class 2 applicants. In the instant case, however, the BLM contends there is no surplus forage available to be designated as either Class 1 or Class 2. This position is understandable only if the basis upon which BLM has awarded use of the allotments is understood. The BLM Manual provides that:

> Before a determination is made as to the availability of forage for allocation to Class 2 applicants, full consideration shall be given to the shifting of Class 1 qualifications from other range areas into the subject area to utilize the excess forage.
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> BLM Manual 4111.42B3b

What the Manual authorizes, therefore, is a shifting of existing Class 1 demands from one area to another area in order to lessen detrimental impacts on the first area. In such a situation there is indeed no surplus forage to be adjudicated as either Class 1 or Class 2. The District Manager could, therefore, have awarded nonrenewable licenses to various permittees and licensees for the use of the land within the Allen and Watson Allotments as replacement for the Class 1 use of other grazing land that would be rested. Had the actions of the District Manager been limited within these parameters, there would be no need for further discussion. It was indicated at the hearing, however, that, in at least one instance, a permittee was granted privileges greatly in excess of its Class 1 demand. The Government stated that this action was justified on the grounds that:

> In order to obtain release and relief of the grazing use in the Brush Creek Allotment out here, and we felt that it was expedient to the Bureau's program to remove those cattle, and as an inducement to get those cattle over to that area, we felt that the additional use then would make it worthwhile for them to go over there.
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> (Tr. at 120-121.)

A District Manager does not have carte blanche to award grazing privileges to whomever he pleases or to any extent that he chooses. On the contrary, the District Manager is obligated to follow the procedures and priorities mandated both by the Taylor Grazing Act of 1934, 48 Stat. 1269, 43 U.S.C. §§ 315 et seq. (1970), and by the applicable regulations. To allow a District Manager to issue nonrenewable licenses in disregard of the priorities established would be subversive of the entire Taylor Grazing Act. Moreover, such action flies in the face of the clear wording of the regulations. Thus, 43 CFR 4115.2-1(i) provides that:

> Nonrenewable licenses may be issued to nonpreference applicants only for the period specified by the District Manager and for the number of livestock for which range is temporarily available and which can be properly grazed without detriment to the operations on the range of applicants owning or controlling base properties in class 1 and class 2. (Emphasis added.)

This regulation clearly limits the District Manager's discretion. First of all, the nonrenewable license can only be issued when it would be "without detriment" to those owning or controlling base properties in either Class 1 or Class 2. The detriment herein is palpably obvious. If, under the guise of a nonrenewable license, one permittee is granted a greater percentage of his Class 1 demand than other permittees in the same district, certainly the operations of the other permittees have suffered a detriment. And the language of the regulation cannot be limited so as to apply only to those individuals who have already been granted grazing privileges of either a Class 1 or Class 2 nature. The regulation speaks of applicants "owning or controlling base properties in Class 1 and Class 2." It does not limit its scope to those who have been awarded grazing privileges.

Nor does the BLM Manual authorize the District Manager to offer "bonus" AUM's to entice permittees to transfer their animals from their own over-grazed range to a range kept in better condition. All that the Manual encompasses is a "shifting of Class 1 qualifications." It cannot serve as a basis for increasing a permittee's or licensee's Class 1 demand.

We are aware that reductions of Class 1 demand have occurred throughout the Vernal District. The regulation 43 CFR 4111.4-2 provides:

> Increases in grazing capacity, when conditions warrant, and after recommendation of the advisory board and approval of the District Manager, will be apportioned in a manner that will assist in the stabilization of livestock operations controlling qualified base property, with emphasis being given to the restoration of reductions that have been imposed to reach the grazing capacity of a particular allotment or range area, and to allocation of increased grazing capacity to operators or interests whose efforts were responsible for such increases.

It is clear from the record, however, that this was not the basis upon which the District Manager authorized "bonus" AUM's. Furthermore, since the reason for the shifting of Class 1 demand to the Allen and Watson allotments was ostensively the overgrazing occurring elsewhere, the recipients of the "bonus" could scarcely be said to be "operators or interests whose efforts were responsible for such increases."

The fact that the District Manager acted in violation of the regulations in awarding "bonus" AUM's in the Allen and Watson allotments does not establish appellant's right thereto. As we have noted above, it was proper for the District Manager to allow a shift of Class 1 demand use for over-used areas to the allotments. Further, even should the District Manager determine that Class 2 forage was available, other parties in the area could also apply for Class 2 grazing privileges. Therefore, we are remanding the case files for a redetermination of appellant's rights.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part, set aside in part, and the case files are remanded for further action consistent with this opinion.

Douglas E. Henriques
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Anne Poindexter Lewis
Administrative Judge